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FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

 In The Matter of

 Regulatory Treatment of LEC Provision
 of Interexchange Services Originating
 in the LEC's Local Exchange Area

and

 Policy and Rules Concerning the
 Interstate, Interexchange Marketplace

CC Docket No. 96-149

CC Docket No. 96-61

**COMMENTS OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION**

The Telecommunications Resellers Association ("TRA"),¹ through undersigned counsel and pursuant to Section 1.429(f) of the Commission's Rules, 47 C.F.R. § 1.429(f), hereby submits its comments on various Petitions for Reconsideration of the *Report and Order*² filed in

¹ A national trade association, TRA represents more than 500 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. Although initially engaged almost exclusively in the provision of domestic interexchange telecommunications services, TRA's resale carrier members have aggressively entered new markets and are now actively reselling international, wireless, enhanced and internet services. TRA's resale carrier members are also among the many new market entrants that are, or soon will be, offering local exchange and/or exchange access service.

² *In the Matter of Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, CC Docket No. 96-149 ("Second Report and Order") and *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61 ("Third Report and Order"), FCC 97-142 (released April 18, 1997) ("Report and Order").

the above-captioned matter.³ In keeping with its Comments and Reply Comments submitted in CC Docket Nos. 96-149 and 96-61, TRA agrees with RCN/Hyperion that the continuing ability of Bell Operating Companies ("BOCs") and incumbent independent local exchange companies ("LECs") to manipulate competitive forces by virtue of their control of bottleneck facilities constitutes a serious threat to the advancement of competition. Indeed, in TRA's opinion, the imposition of even more stringent separation requirements than those imposed by the Commission in the *Report and Order* is warranted. TRA thus urges the Commission, to the extent separation requirements of independent LECs are not affirmatively strengthened, to refrain from any further relaxation of the competitive safeguards set forth in the *Report and Order*.

I.

INTRODUCTION

Through their Petitions for Reconsideration, the incumbent independent LEC petitioners advance the implausible argument that the separation requirements of the *Report and Order* represent a radical departure from those set forth in the *Competitive Carrier Fifth Report and Order*.⁴ Of significantly greater concern, however, is petitioners' steadfast refusal to acknowledge the anticompetitive effects which the *Report and Order's* separation requirements

³ Petitions for Reconsideration and/or Clarification were filed in this matter by RCN Telecom Services, Inc. and Hyperion Telecommunications, Inc. ("RCN/Hyperion"), GTE Service Corporation and its Affiliated Domestic Telephone Operating Companies ("GTE"), ALLTEL Communications, Inc. ("ALLTEL"); the National Telephone Cooperative Association and thirteen independent local exchange carriers ("NTCA"), United States Telephone Association ("USTA"), and Anchorage Telephone Utility ("ATU").

⁴ *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor* ("Fifth Report and Order"), 98 F.C.C. 2d 1191 (1984) ("Fifth Report and Order").

are designed to alleviate -- manipulation by BOCs and independent LECs of the bottleneck facilities which they control, to the potential detriment of their would-be competitors. Not satisfied with the *Report and Order's* modification of existing separation requirements which now mandate (rather than merely allow) independent LEC non-dominant treatment coupled with a separate affiliate requirement, petitioners urge further reduction in the Commission's safeguards against anticompetitive conduct, specifically seeking elimination of the separate affiliate requirement. Additionally, petitioners ask for a sunset of the anticompetitive safeguards before the Commission has seen any evidence that the dangers to competition have been eradicated or even minimized.

Petitioners have not raised any arguments which would justify a further relaxation of the already lenient separation requirements contained in the *Report and Order*. Far from constituting a "radical departure" from previous Commission policy, the separation requirements remain virtually identical to those set forth in the *Fifth Report and Order*, effective for more than a decade. Additionally, although petitioners would obviously prefer not to address their continuing ability to control bottleneck facilities, the Commission has appropriately recognized this ability as a potentially serious threat to the advancement of competition. Thus, in order that the procompetitive goals of the Telecommunications Act of 1996⁵ may be promoted rather than hindered, the Commission has retained a separation requirement as a vital tool in minimizing anticompetitive behavior by BOCs and independent LECs in the provision of in-region, interstate, domestic, interexchange services. Finally, the Commission has prudently determined to evaluate market data as it becomes available rather than attempting to predict at what point sunset of the independent LEC separate affiliate requirement would be appropriate.

⁵ Pub. L. No. 104-104, 110 Stat 56 ("1996 Act").

II.

ARGUMENT

Contrary to the assertion of USTA, the *Report and Order* does not constitute an “unwarranted departure from previous policy”.⁶ Rather, the Commission’s conclusions therein are a logical extension of long standing policy, addressed by the Commission and commented upon by USTA and others during this proceeding. The Commission has merely adjusted, without drastically departing from, the existing separation requirements of the *Fifth Report and Order*. Previously, an independent LEC had the ability to choose between (i) utilizing a separate affiliate to provide interstate, interexchange services coupled with “nondominant” treatment, or (ii) providing service on an integrated basis but remaining subject to “dominant” regulation.⁷ Based on the Commission’s assessment of developments in the interexchange services market, including advances beginning to be seen from the implementation of the 1996 Act, the Commission has modified its concepts of relevant product and geographic markets for purposes of determining whether a carrier is able to exercise market power. As a result, the Commission now deems it inadvisable to permit independent LECs to opt for “dominant” regulation. The *Report and Order* provides a detailed explanation of the Commission’s rationale for modifying these definitions, as well as the ultimate conclusion that independent LECs will no longer be allowed to elect dominant treatment.⁸ Thus, far from constituting an “unwarranted departure from previous

⁶ Petition of USTA at 13.

⁷ See *Fifth Report and Order*, 98 F.C.C. 2d 1191, 1198 (1984).

⁸ *Report and Order*, FCC 97-142 at ¶¶ 158, 159.

policy”, the instant modification is a rational outgrowth of existing Commission policy, accompanied by a reasoned explanation therefor.⁹

ATU is also incorrect that the Commission has “failed to justify the need for requiring that LECs provide in-region, long distance service through a separate legal entity.”¹⁰ The *Report and Order* squarely addresses and rejects the contention that existing cost allocation and affiliate transaction rules alone would “constitute an adequate substitute for the *Fifth Report and Order* separation requirements”.¹¹ Indeed, unlike petitioners, the Commission has unmistakably recognized that coupled with the not insignificant benefits flowing from the access charge rules, imputation requirements and cost allocation and affiliate transaction rules, the separate affiliate rules maintained in the *Report and Order* are essential “to safeguard further ratepayers against cost-shifting, discrimination and price squeezes.”¹²

TRA agrees with RCN/Hyperion that independent LECs retain sufficient ability to affect the competitive marketplace to warrant a more particularized competitive analysis and application of dominant carrier regulation. The Commission has reached a more tempered conclusion. Even while holding that market conditions make it inappropriate to regulate independent LECs as dominant, however, the Commission has found that the continued ability of independent LECs to control local exchange and exchange access facilities gives them both the ability and the incentive to engage in anticompetitive conduct. Noting the potential for substantial harm to consumers, competition and production efficiency which would result from

⁹ See *California v. FCC*, 39 F3d 919 (9th Cir. 1994).

¹⁰ Petition of ATU at 2.

¹¹ *Report and Order*, FCC 97-142 at ¶ 169.

¹² *Id.*

improper allocation of costs, the Commission specifically stated

We disagree . . . with those commenters that assert that independent LECs have no ability to use their bottleneck facilities to harm interexchange competition. . . absent appropriate and effective regulation, independent LECs have the ability and incentive to misallocate costs from their in-region, interstate services to their monopoly local exchange and exchange access services within their local service region.¹³

In light of the anticompetitive dangers identified above, TRA supports the Commission's refusal to acquiesce to the arguments of various commenters, repeated by petitioners here, that the Commission's existing cost allocation rules alone will provide a sufficient safeguard against cost misallocation.¹⁴

Cost misallocation is not the only means by which an independent LEC could disadvantage competitors. The Commission has also recognized that an independent LEC could discriminate against a competitor by providing poorer quality interconnection¹⁵ and by inappropriately delaying the satisfaction of a competitor's interconnection request.¹⁶ And despite the protestations of USTA and NTCA to the contrary,¹⁷ the Commission also remains "concerned that an independent LEC could potentially initiate a price squeeze to gain additional market share" as a result of its control of bottleneck facilities.¹⁸

¹³ *Report and Order*, FCC 97-142 at ¶ 159.

¹⁴ Petition of USTA at 5; Petition of ATU at 2; Petition of NTCA at 4, Petition of ALLTEL at 9.

¹⁵ *Id.* at ¶ 160.

¹⁶ *Id.*

¹⁷ Petition of USTA at 9; Petition of NTCA at 4, 6.

¹⁸ *Report and Order*, FCC 97-142 at ¶ 161.

Interestingly, the Commission has identified the presence of identical risks to competition when a BOC, rather than an independent LEC, controls the bottleneck facilities.¹⁹ Thus, the Commission is aware that the resultant harm to competition will be no less severe when effectuated by an independent LEC than by a BOC. The only conceivable difference is that because independent LECs are not as structurally large as the BOCs, the damage to competition will be limited to a more confined geographic area when brought about by an independent LEC. In the independent LEC's own region, however, the damage will be indistinguishable. When viewed in this context, the leniency of the Commission's independent LEC separation requirement is apparent. Unlike BOCs, independent LECs are not subjected to separation requirements even approaching those contained in Section 272. USTA's sweeping statement that the *Report and Order* effectively imposes such restrictions upon independent LECs in contravention of Congressional intent is without merit.²⁰

As noted above, changes in the interexchange marketplace preclude the continued ability of independent LECs to seek out dominant regulation in order to provide service on an integrated basis. Fully aware that independent LECs generally operate within smaller service areas and tend to serve largely rural areas, the Commission has nevertheless consciously made a policy determination that no exemption to the separate affiliate requirement will be allowed on the basis of the size of an independent LEC. USTA, NTCA and ALLTEL all vigorously urge the Commission that the separation requirements are inappropriate, and therefore should not be

¹⁹ *Id.* at ¶¶ 111, 125.

²⁰ Petition of USTA at 2. TRA also agrees with the Commission that neither is Section 601 of the 1996 Act intended to supersede existing regulations such as the *Fifth Report and Order* separation requirements.

applied to, small independent LECs.²¹ The Commission has appropriately determined, however, that the separate affiliate requirement will apply to all incumbent independent LECs because “the size of an independent LEC will not affect its incentives to engage in cost misallocation between its monopoly services and its competitive services” and applying such regulations will “prevent[] all incumbent LECs, regardless of size, from using their control of bottleneck local exchange and exchange access facilities to thwart new entry.”²²

While the Commission would have been justified in imposing even more stringent separation requirements for independent LECs, the separation requirements of the *Report and Order* present a workable, albeit limited means -- and hardly an overly burdensome one -- of addressing the anticompetitive dangers inherent in the ability of independent LECs to control bottleneck facilities.²³ The Commission has further tempered the ultimate holding of the *Report and Order* by affording a one-year compliance grace period from the date of the Order to those few independent LECs which currently provide in-region, interstate, domestic, interexchange services on an integrated basis pursuant to the now-unavailable “dominant regulation option”.

Finally, the Commission has announced its intention, which is both reasonable and prudent, to reexamine the appropriateness of the independent LEC separation requirements in three years’ time. If significant competition has emerged to justify sunseting separate affiliate requirements at, or even before, that time, the Commission is certainly well-equipped to recognize such developments. TRA finds unwise, however, petitioners’ requests that the Commission

²¹ Petition of USTA at 12-13; Petition of NTCA at 2, Petition of ALLTEL at 7-10.

²² *Report and Order*, FCC 97-142 at ¶ 231.

²³ *Id.* at ¶¶ 165, 167.

determine now the likely timeframe within which sufficient competition is likely to develop.²⁴ TRA urges the Commission to maintain its proposed timetable for evaluating the appropriate sunset period so that the determination may be based upon actual, rather than merely speculative market conditions.

III.

CONCLUSION

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to consider engaging in more specific market analysis to determine the ability of both BOCs and independent LECs to utilize control of bottleneck facilities to the disadvantage of potential competitors. Consistent with the views advanced by TRA in its Comments and Reply Comments in CC Docket Nos. 96-149 and 96-61, TRA also urges the Commission to seriously consider the imposition of more stringent separation requirements for incumbent independent LECs. At a minimum, the Commission should refrain from further relaxing the competitive safeguards set forth in the *Report and Order*. The Commission has attempted to fashion a compromise which balances the goals of encouraging competition without unduly hampering the ability of incumbent independent LECs to operate (and simultaneously limiting their ability to manipulate competitive forces by virtue of their continuing bottleneck control). The Commission also has made clear that the restrictions will last as long as they serve a useful purpose. TRA urges to Commission to require enforcement the *Report and Order*'s competitive

²⁴ Petition of ATU at 4; Petition of ALLTEL at 12.

safeguards -- including the separate affiliate requirement -- for precisely that long; i.e., until independent LECs can no longer utilize bottleneck control to disadvantage competitive rivals.

Respectfully submitted,

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